Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

WILLIAM POPELKA, GARY MUELLER,

and DON ANDERSON,

Petitioners,

v.

ERIC LEE AND THE GENERAL SERVICES ADMINISTRATION

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Merit Systems Protection Board had jurisdiction to determine whether the Petitioners, as Veterans Readjustment Act (VRA) appointees, were unlawfully terminated?

2. Whether VRA appointees can be deprived of their interests in continued employment with the General Services Administration (GSA) without an administrative hearing or any other opportunity to present their claims?

3. Whether the Civil Service Reform Act (CSRA) violates due process guarantees if its application deprives federal employees of any forum in which to present constitutional claims?

PARTIES TO THE PROCEEDING BELOW

The Petitioners sought review to the United States District Court for the District of Montana of the wrongful termination of their employment with the General Services Administration (GSA). The District Court held that it had no jurisdiction and dismissed the case. That decision was affirmed by the United States Court of Appeals for the Ninth Circuit.

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The Petitioners respectfully request that this Court grant a petition for writ of certiorari, seeking review of

the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.[1]

DECISIONS BELOW

	Appendix
Anderson, Popelka and Mueller v. Jim O'Keefe; United States General Services Administration, No. 92-36700, Memorandum Op. (9th Cir. Feb. 11, 1994)	1-6
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1 The Petitioners have also filed, contemporaneously herewith, a petition for writ of certiorari, seeking review of a conflicting judgment and opinion from the United States Court of Appeals for the Federal Circuit. Both petitions are related and present the same issues.

Appendix

Anderson, Popelka and Mueller v. General Services Administration, MSPB Docket No. DE344392045II1, Opinion and Order (January 29, 1993) 24-32

Anderson, Popelka, and Mueller v. Merit Systems Protection Board, No. 93-3219, ____ F.3d ____ (Fed.Cir. Dec. 16. 1993) 33-43

JURISDICTION

The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The Ninth Circuit entered judgment in this case on February 11, 1994. See Appendix 1-6. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

38 U.S.C. § 4214(a)(1) provides as follows:

> The United States has an obligation to assist veterans of the Armed Forces in readjusting to civilian life since veterans, by virtue of their military service, have lost opportunities to pursue education and training oriented toward civil careers. The Federal Government is also continuously concerned with building an effective work force, and veterans constitute a major recruiting source. It is, therefore, the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for disabled veterans and certain veterans of the Vietnam era and of the post-Vietnam era who are qualified for such employment and advancement.

38 U.S.C. § 4214(b)(1)(E) provides as follows:

> [A] veteran given an appointment under the authority of this subsection whose employment under the appointment is terminated within one year after the date of such appointment shall have the same right to appeal that termination to the Merit Systems Protection Board as a career or career-conditional employee has during the first year of employment.

STATEMENT OF THE CASE

During late 1989 and early 1990, three of the eight full-time custodial positions at the Federal Building in Billings, Montana became vacant. The GSA sought to fill those vacancies with Vietnam combat veterans who were preference eligible under the Veterans Readjustment Act (VRA), 38 U.S.C. § 4214. The three Petitioners were the only applicants who qualified for VRA appointments.[2] As the three custodial vacancies constituted full-time positions, the GSA was prohibited by its own written personnel policies from filling those positions with "temporary" employees.

The three Petitioners were subsequently hired by the GSA to fill those three full-time custodial vacancies. The Petitioners were explicitly informed and the GSA affirmatively led them to believe that their custodial jobs with the GSA were VRA appointments, and that they

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2 By statute, custodial positions with the Government are specifically restricted to preference eligible employees. See 5 U.S.C. § 3310. The three custodial vacancies involved here had previously been filled by permanent VRA appointees.

could not be terminated except for reasons related to job performance. Despite the fact that they performed their custodial work in an exemplary manner, and received salary increases and monetary bonuses in recognition of their excellent job performances, the GSA nonetheless notified the Petitioners, shortly before their two-year anniversary dates, that they would be terminated from their positions. The notices provided the Petitioners with no reason for their terminations, other than, in the view of the GSA, they were "temporary" employees.

On February 27, 1992, the Petitioners instituted an action in United States District Court for the District of Montana seeking preliminary injunctive and mandamus relief. The Petitioners subsequently amended their Complaint to allege, in addition to a constitutional tort claim, that the GSA was equitably estopped from contending that they were other than VRA appointees, and sought declaratory relief to that effect. In granting the Government's motion to dismiss for lack of jurisdiction,

the district court cited the MSPB as the appropriate forum for Petitioners' complaints. See Appendix 19.

The Petitioners filed a motion for relief from the district court's judgment. In that motion, the Petitioners' attorneys notified the district court that they had contacted the Office of Special Counsel (OSC) for the MSPB, and had been informed that the MSPB would not assert jurisdiction over their claims. See, e.g., Cinnamon v. FAA, 10 MSPR 598 (1982). It was argued, therefore, that unless the district court exercised jurisdiction in this matter, the Petitioners would be deprived of a forum in which to present their claims. The district court denied the motion. See Appendix 21-23.

The Petitioners then sought review by the MSPB, and the Government again moved to dismiss for lack of jurisdiction. The MSPB held that it had jurisdiction to review agency decisions to terminate "employees" as that term is defined in 5 U.S.C. § 7511(a)(1), but that because the GSA had designated the Petitioners "temporary" on

their SF-50 forms, they were not employees over whom the MSPB had jurisdiction. See Appendix 27-29.

The Petitioners appealed the MSPB's decision to the United States Court of Appeals for the Federal Circuit, pursuant to 5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9). The Federal Circuit affirmed the MSPB ruling that it had no jurisdiction of the Petitioners' claims. See Appendix 33-43. In so doing, however, the Federal Circuit strongly indicated that the Petitioners should be entitled to some forum in which to present their grievances:

> It is important to understand what is at issue here. The question before us is not whether the Government behaved in a way that entitles these Petitioners to redress; the question is only whether, if redress is to be sought, Congress has authorized the MSPB to provide it.

Appendix 42 (emphasis added).

During the course of appealing the MSPB ruling to the Federal Circuit, the Petitioners were similarly appealing the dismissal judgment of the United States

District Court for the District of Montana to the U.S. Court of Appeals for the Ninth Circuit, pursuant to 28 U.S.C. § 1291. The Ninth Circuit affirmed the district court's dismissal of Petitioners' claims for lack of jurisdiction. See Appendix 1-6. In its memorandum decision, however, and contrary to the decision which had previously been rendered by the Federal Circuit Court of Appeals, the Ninth Circuit indicated in a footnote that the MSPB would have jurisdiction over Petitioners' claims. See Appendix 5-6 n.2.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit Court of Appeals Has Rendered a Decision Which Directly Conflicts with a Previous Decision of the Federal Circuit Court of Appeals on the Same Matter.

Relying exclusively upon the "temporary" designation which the GSA had inappropriately inserted on Petitioners' SF-50 forms, the MSPB determined that it

lacked jurisdiction over their claims.[3] The Petitioners timely appealed that decision. Pursuant to 5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9), the U.S. Court of Appeals for the Federal Circuit had exclusive jurisdiction over appeals from final decisions of the MSPB. Although it strongly indicated that some forum should be made available, the Federal Circuit conclusively determined in a published opinion that the MSPB had no jurisdiction to address the Petitioners' claims. A copy of the Federal Circuit's opinion was provided by the Petitioners to the U.S. Court of Appeals for the Ninth Circuit.

Despite the clear decision by the Federal Circuit that the MSPB lacks jurisdiction in this matter, the Ninth

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3 Such reliance was wholly inappropriate. In Grigsby v. U.S. Dept. of Commerce, 729 F.2d 772, 776 (Fed.Cir. 1984), the Federal Circuit determined that "the SF-50 is not a legally operative document controlling on its face an employee's status and rights."

Circuit decided that jurisdiction over Petitioners' claims would be proper with the MSPB.[4]

Consequently, there are decisions rendered by two U.S. Courts of Appeal on the very same jurisdictional matter which are directly contrary to one another. The Federal Circuit says that the MSPB lacks jurisdiction over Petitioners' claims, and the Ninth Circuit disagrees. On this basis, and pursuant to Rule 10 of the Rules of the Supreme Court, an exercise of this Court's power of supervision is clearly warranted.

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4 The Ninth Circuit opined that the Petitioners' grievances sounded in the nature of "prohibited personnel practices," and that the Office of Special Counsel (OSC) was authorized to bring such actions before the MSPB. See Appendix 42-43 n.2 The Government had made this very same argument to the Federal Circuit during the course of the Petitioners' appeal there from the MSPB dismissal. The Petitioners pointed out that, like any other party, the OSC has the burden of establishing MSPB jurisdiction, see, e.g., Special Counsel v. Peace Corp, 31 MSPR 225 (1986); Acting Special Counsel v. Dept. of Treasury, 6 MSPR 140 (1981), and that 5 U.S.C. § 2302(b) does not provide an independent source of MSPB jurisdiction. See Wren v. Department of the Army, 2 MSPR 1, 2 (1980), aff'd, 681 F.2d 867, 871-73 (D.C.Cir. 1982). Thus, while obviously aware of the procedures by which claims can be pursued to the MSPB by the OSC, the Federal Circuit nevertheless determined that the MSPB simply does not have jurisdiction in this matter.

B. The Petitioners are Entitled as a Matter of Due Process to a Forum in Which to Present Their Grievances.

The Petitioners are undoubtedly entitled to present their grievances to some administrative or judicial forum. Even the conflicting decisions from the two U.S. Courts of Appeal involved here would seemingly agree on that fundamental aspect of due process. The problem here, however, is that every administrative agency or court in which the Petitioners have sought redress has denied them a forum.

As the Petitioners have alleged throughout this case, they were informed and the GSA affirmatively led them to believe that they had been appointed to their custodial positions under the Veterans Readjustment Act (VRA), 38 U.S.C. § 4214. As VRA appointees, the Petitioners were serving a probationary period which, after two years of substantially continuous service, the GSA was required to convert to permanent career positions. See 5 C.F.R. § 315.705(a)(2). The GSA is required to utilize this probationary period to determine an

employee's fitness for continued employment, see 5 C.F.R. § 315.803, and is prohibited from terminating an employee during that time except for unsatisfactory performance or conduct. See 5 C.F.R. § 315.804. Moreover, VRA appointees are statutorily entitled to appeal their terminations to the MSPB. See 38 U.S.C. § 4214(b)(1)(E).

It has been well settled for over two decades that an individual may have a property interest in government employment protected by the fifth amendment. See Board of Regents v. Roth, 408 U.S. 564, 577-78, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). To have a property interest in government employment, the employee must be able to demonstrate an entitlement to the job. Entitlements arise from "'rules or understandings' from independent sources, such as statutes, regulations, and ordinances, or express or implied contracts." Orloff v. Cleland, 708 F.2d 372, 377 (9th Cir. 1983)(quoting Board of Regents v. Roth, 408 U.S. at 577). To find an entitlement to a job based on an "understanding," the

understanding must be "mutually explicit," and may be implied from "the [defendants'] words and conduct in the light of the surrounding circumstances." Perry v. Sindermann, 408 U.S. 593, 602, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Whether or not such an understanding exists "will frequently turn on factual questions." Roth v. Veteran's Administration, 856 F.2d 1401, 1409 (9th Cir. 1988)(citing Orloff v. Cleland, supra, 708 F.2d at 377).[5]

The Petitioners have continuously alleged in every administrative and judicial tribunal in which they have sought redress, that the GSA's conduct and treatment of them and other custodial employees, their salary increases and monetary bonuses for exceptional job performances,

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5 The Supreme Court has established that even as probationary employees, the Petitioners could still have property interests in their custodial jobs if they had expectations of continued employment. See Board of Regents v. Roth, supra, 408 U.S. at 577(citing Connell v. Higginbotham, 403 U.S. 207, 208, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971)(holding that teacher without tenure enjoyed due process rights). See also Orloff v. Cleland, supra, 708 F.2d at 377 (remanding to district court for findings on existence of mutually explicit understanding that part-time VA employee had expectation of continued employment).

and discussions with their supervisors all created a mutually explicit understanding of continued employment. See, e.g., Orloff v. Cleland, supra, 708 F.2d at 377 (prior treatment of plaintiffs and other VA employees may give rise to mutual understanding sufficient to constitute a *de facto* property interest). If there was such an understanding, the Petitioners had a clearly established right to retain their jobs pursuant to that understanding, unless the GSA provided them with due process. At the very least, and in light of the Petitioners' allegations, they are clearly entitled to a hearing so that the merits of their claims can be addressed:

> In this case, the respondent has alleged the existence of rules and understandings . . . that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement . . .

Perry v. Sindermann, supra, 408 U.S. at 602-03 (emphasis added).

The problem in this case, of course, is that the Petitioners have not been given the opportunity to prove their claim of entitlement to continued employment. Every administrative and judicial forum to which they have turned have refused them jurisdiction. Consequently, as such rulings have deprived the Petitioners of their right to pursue their due process claims, an exercise of the Supreme Court's power of supervision in this matter is mandated.[6]

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6 The Supreme Court has never held that the administrative scheme created by the Civil Service Reform Act (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (1978)(codified, as amended, in various sections of 5 U.S.C.) can operate to deprive federal employees of any forum in which to present employment-related claims. See Bush v. Lucas, 462 U.S. 367, 391, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983)("[T]here is nothing in today's decision to foreclose a federal employee from pursing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the [CSRA]") (Marshall, J. concurring); United States v. Fausto, 484 U.S. 439, 455, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988)(implying that a federal employee could maintain a *Bivens* action despite the CSRA under certain circumstances)(Blackmun, J., concurring); see also Saul v. United States, 928 F.2d 829, 837 (9th Cir. 1991)("No Supreme Court opinion holds squarely that the CSRA always prevents federal employees from bringing *Bivens* actions to

CONCLUSION

The Petitioners have been deprived of their interest in continued employment with the GSA by a scheme which can only be characterized as fraudulent. They have attempted to seek redress in a federal district court, in the Merit Systems Protection Board, and in two federal Circuit Courts of Appeal. Although recognizing that a forum should be available, none of these courts or administrative agencies will provide the Petitioners with jurisdiction.

Based on the foregoing, the Petitioners respectfully request that this Court grant the petition for writ of certiorari and resolve this jurisdictional dilemma. If this jurisdictional dilemma is not resolved, the GSA will obviously continue to violate with impunity the rights of other federal employees, knowing that such employees

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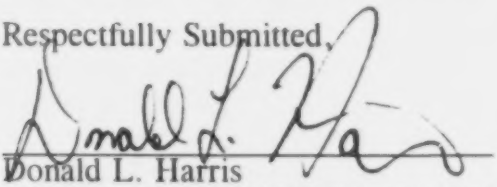
right job-related wrongs"). Indeed, and as the Supreme Court has steadfastly recognized, "'serious constitutional question[s]' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Webster v. Doe, 486 U.S. 592, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988)(citing Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986))(emphasis added).

will never be able to seek redress. In the alterative, and should the CSRA operate to deprive federal employees of a forum in which to present colorable constitutional claims, the Act should be declared unconstitutional.

Respectfully Submitted,



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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM POPELKA; GARY MUELLER, DON ANDERSON	) No. 92-36700) 92-36701)DC No. CV-92-) 48-JDS
Plaintiffs-Appellants,	)
v.	)
JIM O'KEEFE; UNITED STATES GENERAL SERVICE ADMINISTRATION	) MEMORANDUM*
Defendants-Appellees.	)

Appeal from the United States District Court for the District of Montana
Jack D. Shanstrom, District Judge Presiding

Submitted February 2, 1994**
[Filed February 11, 1994]
Seattle, Washington

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a) and Ninth Circuit Rule 34-4.

Before: WRIGHT, REAVLEY,*** and LEAVY, Circuit Judges.

Appellants (the custodians) claim that the General Services Administration (GSA) and one of its regional administrators misled them in the course of their employment with the Government, and terminated their employment in violation of their constitutional rights. They brought this action in federal district court, seeking mandamus, injunctive and monetary relief. The complaint does not assert claims under a federal statute which expressly creates a private cause of action for federal employees who have an employment dispute with the Government. Instead, the claims can be characterized as Bivens-type constitutional claims. We agree with the district court that such claims are not cognizable in federal district court in light of the Civil Service Reform Act (CSRA).

*** Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

This court has consistently held that federal civil service employment disputes cannot be brought originally in federal district court, but must instead be resolved under the comprehensive administrative scheme created by the CSRA. "Congress' purpose in enacting the CSRA was to channel grievances and disputes arising out of government employment into a single system of administrative procedures and remedies, subject to judicial review." Rivera v. United States, 924 F.2d 948, 951 (9th Cir. 1991). We have held that the CSRA has provisions designed to protect civil servants from personnel practices which contravene their constitutional rights, and that Bivens-type claims asserting constitutional violations cannot be brought by federal employees in federal district court. Karamanos v. Egger, 882 F.2d 447, 451-53 (9th Cir. 1989)(holding that claim of improper job classification seeking mandamus and other relief precluded by CSRA); Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989)(holding that Bivens claim brought by probationary employee and alleging that demotion violated

privacy and free speech rights precluded by CSRA); Veit v. Heckler, 746 F.2d 508, 511 (9th Cir. 1984)(noting that "other circuits have held that the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all" and holding that "the federal courts have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere."). Recognition of congressional intent to create a uniform, balanced administrative scheme for review of federal personnel actions compels the conclusion that the CSRA precludes such federal district court actions, whether or not the CSRA provides the remedy sought by the federal employee. United States v. Fausto, 484 U.S. 439, 448, 455 (1988); Saul v. United States, 928 F.2d 829, 840 (9th Cir. 1991)(holding that "the CSRA precludes even those Bivens claims for which the act prescribes no alternative remedy.").

The GSA classified the custodians as temporary employees. The rights of temporary employees are limited under the CSRA.[1] Nevertheless, such employees are covered by the CSRA and are afforded some rights to challenge personnel actions.[2] Based on the authorities

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1 Chapter 43 of the CSRA covers agency action against civil servants based on unacceptable job performance. An agency can terminate or reduce in grade a civil servant under this Chapter provided that certain notice and hearing procedures are followed, and the employee has a right to appeal the agency decision to the Merit Systems Protection Board (MSPB). 5 U.S.C. § 4303. However, this chapter excludes employees serving under temporary appointments. Id. § 4303(f)(2). Chapter 75 covers suspensions, terminations and other adverse actions taken against civil servants to "promote the efficiency of the service." Id. §§ 7503(a), 7513(a). Suspensions of 14 days or less must be made in compliance with certain procedural safeguards. Id. § 7503. More serious personnel actions, including terminations, may be appealed to the MSPB. Id. § 7513(d). Chapter 75 does not apply to temporary employees. Id. §§ 7501(1), 7511(a)(1)(A)(ii).

2 Temporary employees are covered by Chapter 23 of the CSRA. Chapter 23 forbids "prohibited personnel practices." 5 U.S.C. § 2302(a)(1). Such practices include "personnel action" in violation of any law, rule or regulation directly concerning the "merit system principles." Id. § 2302(b)(11). "Personnel action" includes any personnel action with respect to an employee in or applicant for a "covered position." Id. § 2302(a) (2)(A). A covered position includes any position in the "competitive service." Id. § 2302(a)(2)(B). The "competitive service" includes all employees in the civil service except for certain excepted employees such as those requiring Senate confirmation. Id. § 2102. The "merit system principles" are an extremely broad set of principles.

cited above, the custodians' claims cannot be brought in federal district court and were properly dismissed. Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989)(en banc), cert. denied, 498 U.S. 957 (1990), is distinguishable because that case involved a plaintiff who was a member of the armed forces, which is excluded entirely from the CSRA. See 5 U.S.C. § 2101 (defining civil service).

AFFIRMED

They include the principles that "[a]ll employees and applicants for employment should receive fair and equitable treatment . . . with proper regard for their privacy and constitutional rights," that "[e]qual pay should be provided for equal value," that "[e]mployees should be retained on the basis of the adequacy of their performance," and that employees should be protected from "arbitrary action." Id. § 2301(b)(2),(3),(6),(8). The Office of Special Counsel (OSC) is directed to receive and investigate allegations of prohibited personnel practices. Id. § 1214(a)(1)(A). The OSC is authorized to bring actions before the MSPB to correct prohibited personnel practices. Id. § 1214(b)(2)(B).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

WILLIAM POPELKA, GARY MUELLER, and DON ANDERSON,	) Cause No.) CV 92-48-BLG-JDS
Plaintiffs,	)
vs.	)
ERIC LEE and THE GENERAL SERVICES ADMINISTRATION	) MEMORANDUM AND) ORDER
Defendants.	)

Plaintiffs William Popelka, Gary Mueller and Don Anderson move the Court to clarify or modify its March 23, 1992 preliminary injunction. In addition, both parties move for partial summary judgment on the issue of the plaintiffs' job status with defendants Eric Lee and Government Service Administration (collectively GSA). At present, an injunction preserves plaintiffs' employment status quo pending the implementation of administrative remedies.

BACKGROUND

During 1990, GSA hired these three plaintiffs to augment its custodial staff at the federal building in Billings, Montana. For each of the positions filled, GSA replaced a permanent, or permanent appointment, employee. Despite the fact that GSA had a continuing and permanent need for custodial employees to complete the tasks assigned to these plaintiffs, GSA hired them on a seemingly temporary basis. For each employee, GSA filed an SF-50 form setting forth the temporary nature of the appointment. Plaintiffs contend they were never apprised of their temporary status and that it violated several provisions of the Federal Personnel Manual. Nevertheless, shortly before their two-year anniversary date, GSA unceremoniously terminated the plaintiffs' jobs in order to subcontract the labor from an organization hiring only handicapped persons.[1]

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1 Known as the National Industry for the Severely Handicapped Workshop (NISH).

At the original injunction hearing, William Popelka testified that all three plaintiffs were led to believe GSA hired them under the **Veterans' Readjustment Act** (VRA), **38 U.S.C. § 1001 et seq.**, with an opportunity for permanent employment. This understanding was never memorialized in their SF-50 job status forms and GSA contends it never guaranteed any type of permanent employment. The essence of the factual controversy in this case revolves around whether GSA officials represented to the plaintiffs that they had permanent job status. Once a finder-of-fact determines the job status of plaintiffs, it must consider whether plaintiffs were wrongfully terminated.

On May 23, 1992, I issued a preliminary injunction preventing any job status change until plaintiffs had an opportunity to take advantage of administrative remedies. This injunction still controls this case and, in particular, prevents any further personnel action by defendants "until such time as the General Counsel takes action either accepting or denying this case." Order of

March 23, 1992, at 6. GSA recently notified the Court that the General Counsel has reviewed the case and filed an action. GSA now considers the Court's injunction to have lapsed by its own terms.

I predicated the injunction upon two findings: first, the plaintiffs raised serious questions of fact and law on the unfair labor practice and veterans' status issues; and, second, since no administrative process was available, the plaintiffs were threatened with irreparable injury by a complete lack of process or remedy. The General Counsel's recent complaint filed with the Federal Labor-Management Relations Board provides plaintiffs with some administrative process. Plaintiffs argue that this process does not satisfy their claims and leaves them with the continuing threat of irreparable injury.

GSA contends that the General Counsel's complaint changes the underlying jurisdictional basis for this action. Therefore, GSA asks the Court to re-examine its jurisdiction prior to entertaining further injunctive relief or reviewing the merits of the case. GSA argues, in

the alternative, that even should jurisdiction exist, the plaintiffs' claims fail to withstand summary judgment.

In their amended complaint, plaintiffs reiterate their requests for injunctive and mandamus relief, renew their due process challenge to the termination and add a claim of wrongful termination under the VRA. Their wrongful termination claim includes a prayer for declaratory relief. In their motion for partial summary judgment, plaintiffs request a declaration that they are VRA employees and that they are entitled to all of the benefits and protections afforded by the VRA and other applicable laws.

DISCUSSION

Both parties acknowledge that plaintiffs will have some cause of action at the administrative level. The General Counsel to the Federal Labor-Management Relations Board (FLRB) has filed a Federal Labor-Mangement Relations Act (FLRA) claim on behalf of plaintiffs, their union and other similarly situated

custodians. The complaint alleges an unfair labor practice pursuant to 5 U.S.C. § 7118.

Plaintiffs argue, however, that since this forum will not address their individual job status claims as VRA permanent appointees, this Court must retain jurisdiction of the case and issue a declaratory order deciding the job status issue. While GSA seems to concede plaintiffs' point that the FLRB will not address job status, it argues that the threshold issue of job classification is one properly decided by the Merit Systems Protection Board (MSPB), which has jurisdiction over "prohibited personnel action[s]" as defined in 5 U.S.C. § 2302. See, e.g., Houlihan v. Office of Personnel Management, 909 F.2d 383 (9th Cir. 1990). Therefore, GSA argues that Congress has removed this Court's jurisdiction because these statues provide a comprehensive remedy for all personnel action claims against federal agencies.

The MSPB serves as an important remedial cog in the **Civil Service Reform Act** (CSRA), **5 U.S.C. § 1101 et seq.** The Merit System ensures that federal employees

receive fair and equitable treatment "with proper regard for their privacy and constitutional rights," **5 U.S.C. 2301(b)(2)**, without being subject to arbitrary action and personal favoritism. **5 U.S.C. § 2301(b)(8)(A)**. It also ensures that "[e]mployees should be retained on the basis of the adequacy of their performance . . . ." **5 U.S.C. § 2301(b)(6)**.

To initiate a claim under the Act, an aggrieved employee must first present allegations of a "prohibited personnel practice" claim to the Office of Special Counsel. **5 U.S.C. §§ 1212(a)(2), 1214(a)(1)(A)**. Pursuant to statute and regulation, the Special Counsel must review the allegations and decide whether to proceed with an action before the MSPB. **5 U.S.C. § 1212(a)(2)(A), 1214(b)**. There are limited instances where an employee may place a claim before the MSPB without proceeding through the Office of Special Counsel. For instance, plaintiffs, as permanent VRA employees, may also file a direct appeal with the MSPB as veterans pursuant to **5 U.S.C. § 7511(a)(1)(B)**.

Plaintiffs contend that these administrative avenues will not completely protect their rights as permanent VRA appointees. They cite several cases indicating that MSPB has no jurisdiction to hear the job status complaints of temporary employees. See Cinnamon v. FAA, 10 M.S.P.R. 598, 600 (1982); Hunter v. Dep't of Army, 40 M.S.P.R. 449 (1989). Plaintiffs urge this Court to hear their claims and resolve the job status issue. They rely upon dicta in Bush v. Lucas, 462 U.S. 367, stating that a **Bivens**-type claim may lie where an employee's injury is not attributable to a personnel action which may be remedied under the federal statutory scheme. Id. at 391 (Marshall, J. concurring).

Plaintiffs also rely on case law allowing a cause of action for promissory estoppel against the government. In Beacom v. Equal Employment Opp. Comm'n, 500 F.Supp. 428 (D. Ariz. 1980), the district court allowed an attorney to sue for permanent injunctive relief on the theory of estoppel. The government breached oral and written promises to appoint plaintiff to permanent service

with the government. Only after plaintiff abandoned his long-standing law practice did the government decide to breach. The court found that the government may be subject to estoppel if its actions amounted to "affirmative misconduct." Id. at 436. The court reinstated the attorney to his permanent position. Id. at 438-9.

Despite these authorities, however, plaintiffs here have remedies available through the administrative process. Even when considered temporary employees, they may file an original action with the Office of Special Counsel pursuant to **5 U.S.C. § 2302(a)(2)(B)**. This type of original action jurisdiction requires only that they present a question defined as a "prohibited personnel practice." **5 U.S.C. § 2302(a)**. Should the Special Counsel find that the complaint contains meritorious claims, it will be reviewed by the MSPB. **5 U.S.C. § 1212(a)(2)(A), 1214(b)**. Furthermore, if plaintiffs take a direct employee appeal under the VRA, any resulting final order, even one dismissing the case for lack of jurisdiction, is subject to judicial review in the circuit

court. Maddox v. Merit Systems Protection Board, 759 F.2d 9, 10 (D.C. Cir. 1985).

Although plaintiffs complain they are not guaranteed a forum for the issues raised in the complaint, this Court's jurisdiction does not hinge upon an exhaustive analysis of what claims might be received by the MSPB. Instead, district court jurisdiction depends upon the intent of Congress in establishing the civil service administrative appeals system.

The existence of district court jurisdiction in the government employment context was reviewed by the Ninth Circuit Court of Appeals in Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989), where plaintiff sued the government and his supervisors for demoting him from a probationary superior position. The Ninth Circuit Court of Appeals held that although the **Civil Service Reform Act** provided inadequate relief, the district court had no jurisdiction to supply a court-imposed remedy based upon Bivens v. Six Unknown Named Agents of the

Fed. Narcotics Bureau, 403 U.S. 388 (1971). The Court stated:

> Because Congress provided some mechanism for appealing adverse personnel actions, it cannot be said that the failure to provide damages, or complete relief, was "inadvertent." As a result, this court cannot imply a **Bivens** remedy.

This reluctance to allow district court jurisdiction to contravene the CSRA applies broadly to various forms of government employment issues. In Berry v. Hollander, 925 F.2d 311 (9th Cir. 1991), a VA doctor had his surgical privileges revoked and was allegedly driven from his job. The court noted that Congress has established a statutory scheme to handle VA personnel grievances. It held that "where Congress has provided some mechanism for relief, **Bivens** claims are precluded." Id. at 313 (citations omitted). The court declined to "upset the balance of interests struck by Congress" where the statutory system provided a "measure of relief." Id. at 314. The court held, "Although these remedies [under the

statutory scheme] do not guarantee full and independent compensation for constitutional violations . . . , they do indicate a Congressionally-authorized and comprehensive remedial scheme sufficient to preclude additional forms of relief." Id. at 315.

The court reaffirmed this holding in Saul v. United States, 928 F.2d 829, 840 (9th Cir. 1991) and, in doing so, stated:

> The CSRA's comprehensive remedial provisions convince us that there was no inadvertence by Congress in omitting a damages remedy against supervisors whose work-related actions allegedly violate a subordinate's constitutional rights.

It added that the CSRA also preempts common law tort claims because Congress "left no room for them to operate." Id. at 843.

Plaintiffs raise a number of serious issues concerning their initial job status and GSA's attempt to terminate them. But this conclusion in itself cannot suffice as a source of jurisdiction. Congress has broadly

legislated this case and others like it into a comprehensive system of administrative review. I have no indication from any recent case law that Congresss created a job status exception to the CSRA administrative review system. On the other hand, the CSRA provides for administrative review of "prohibited personnel actions," which include appointment and removal decisions. **5 U.S.C. § 2302(a)(2)(A)**.

Plaintiffs may file a direct appeal of GSA's termination decision or they may avail themselves of the Office of Special Counsel, which may, in turn, file an action with the MSPB. The mere availability of these CSRA remedies serves as a "special factor counseling against recognition of a **Bivens** remedy for [plaintiffs]." Saul, 928 F.2d at 840. These same factors counsel against district court review of the estoppel claims. Estoppel claims against the government are subject to significant restrictions that do not apply in actions against private parties. See e.g., Heckler v. Community Health Services, 467 U.S. 51 (1984); Schweiker v. Hansen, 450

U.S. 380 (1947). By enacting the CSRA's comprehensive system of administrative review, Congress weighed the appropriate limitations upon promissory estoppel claims raised in employment appointment and hiring decisions. See Saul, 928 F.2d at 840, 843. To the extent that this cause of action is not available at the administrative level, it is preempted.

Based on the foregoing,

IT IS ORDERED that defendants' motion to dismiss on the basis of lack of jurisdiction is granted. **The Civil Service Reform Act** preempts all causes of action embodied in Counts I and II of the Amended Complaint. Therefore, plaintiffs' requests for mandamus relief, further injunctive relief, declaratory judgment, and compensatory damages are denied.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment accordingly.

DONE and **DATED** this 18th day of June, 1992.

Jack Shanstrom
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

WILLIAM POPELKA, GARY MUELLER and DON ANDERSON,	) Cause No.) CV 92-48-BLG-) JDS
Plaintiffs,	)
vs.	) **O R D E R**
ERIC LEE and the GENERAL SERVICES ADMINISTRATION,	)
Defendants.	)

Plaintiffs in the above-entitled litigation seek relief, pursuant to **Fed.R.Civ.P. Rule 60(b)**, from this Court's previous order of June 18, 1992. Upon careful review of the briefs and submitted documents, I am prepared to rule.

Plaintiffs argue that administrative remedies are non-existent, thus leaving this Court with no choice but to retain jurisdiction in order to avoid injustice. Such argument is based on a filed affidavit alluding to one administrative agency's inability to hear the case. Such

argument is further supported by copies of filed administrative claims.

Plaintiffs' assumptions regarding the "probable outcome" of the administrative claim does not affect this Court's previous order. Despite plaintiffs' assertions, all of the Court's original considerations concerning Congressional intent remain intact.

The jurisdiction vested in this Court is not dependent upon an analysis of the various administrative options that may or may not be available to plaintiffs. On the contrary, as stated in this Court's order of June 18, 1992, jurisdiction is founded upon Congressional intent in establishing the civil service administrative appeals system. This Court does not interpret Congressional intent as providing for jurisdiction in this case, in the face of the Congressionally created CSRA. See, generally, **Saul v. United States**, 928 F.2d 829 (9th Cir. 1991).

The assertion by plaintiffs that their proposed administrative claims may be unsuccessful does not permit this Court to contradict Congressional intent and entertain

jurisdiction. Plaintiffs simply have not provided the Court with any substantial or compelling reason to provide relief in accordance with **Rule 60(b)**.

Accordingly,

IT IS ORDERED that plaintiffs' motion for relief from the Court's June 18, 1992 order is denied.

DONE and **DATED** this 26th day of August, 1992.

Jack D. Shanstrom
United States District Judge

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DONALD G. ANDERSON, WILLIAM K. POPELKA, GARY R. MUELLER, Appellants,	) DOCKET NUMBERS)) DE3443920451-I-1) DE3443920450-I-1) DE3443920452-I-1
v.	) DATE: Jan 29, 1993
GENERAL SERVICES ADMINISTRATION, Agency.	)

Harry L. Dawson, American Federation of Government Employees, Fort Worth, Texas, for the appellants.

John M. Hewins, Esquire, Denver, Colorado, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellants have petitioned for review of an initial decision dismissing their appeals for lack of jurisdiction. For the reasons discussed below, we DENY

the petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN the appeals on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still dismissing the appeals.

BACKGROUND

The appellants, who were separated from positions in the competitive service, filed individual appeals of their separations. *See, e.g.*, Initial Appeal File (IAF) (*Anderson*), Tab 1; IAF, Tab 12, Subtabs 1-6. After providing them with an opportunity to show that the Board had jurisdiction over the appeals, and after consolidating the appeals, the administrative judge issued an initial decision dismissing the consolidated appeals as outside the Board's jurisdiction. *See, e.g.*, IAF (*Anderson*), Tabs 2, 7; IAF, Tab 13 (Initial Decision). In their petition for review, the appellants allege that the administrative judge erred in finding that the Board lacked jurisdiction over their appeals.

ANALYSIS

The administrative judge's finding that the Board lacked jurisdiction over the appellants' appeals appears to have been based on his belief that the Board lacked jurisdiction over any termination of a temporary appointment. *See* Initial Decision at 3 ("[t]he Board has long held that it is without jurisdiction to adjudicate the termination of a temporary term limited appointment"). We know of no basis for such a broad holding. While one of the decisions on which the administrative judge relied supports the proposition that a separation on the expiration date of an appointment does not constitute a removal appealable to the Board, *Soehngen v. Department of Justice*, 47 M.S.P.R. 169, 172 (1991),[1] that decision does not indicate that a separation before that date may not be appealed under any circumstances.[2]

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1 The other decision on which the administrative judge relied, *Dubose v. United States Postal Service*, 45 M.S.P.R. 252 (1990), concerns Board jurisdiction over agency denials of requests for the restoration of partially recovered employees. We see nothing in that decision that is relevant to this appeal.

2 An authority cited in that decision indicates that the reason a separation on the expiration of an appointment is not

For the reasons stated below, however, we concur in the administrative judge's conclusion that the Board lacks jurisdiction over the appellants' appeals.

First, we note that, under 5 U.S.C. §§ 7512(1) and 7513(d), the Board has jurisdiction over an appeal from the removal of an "employee," as that term is defined at 5 U.S.C. § 7511(a)(1). An individual in the competitive service is an "employee" if (1) he is not serving a probationary or trial period under an initial appointment and (2) he has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. 5 U.S.C. § 7511(a)(1)(A).

The appellants were employed in the competitive service, *see* IAF, Tab 12, Subtabs 1-6, and there is no indication in the record that any of them was serving a probationary or trial period at the time of his separation.

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appealable is that the separation simply carries out the terms of the appointment. *See Berger v. Department of Commerce*, 3 M.S.P.R. 198, 199-200 (1980), cited in *Soehngen*, 47 M.S.P.R. at 172.

Furthermore, the record indicates that each appellant had been continuously employed by the agency for more than a year when he was separated. *See* IAF, Tab 12, Subtabs 1-6. None of the appellants, however, has shown that he had a year of current continuous service other than service under a temporary appointment limited to a year or less. The service of appellant Anderson appears to have been performed entirely under two temporary appointments, each of them limited to 1 year, *see id.*, Subtabs 1, 2, 8, 11; and, except for a period lasting well under a year, the service of the other two appellants was performed under two temporary appointments, each of them limited to 1 year, *see id.*, Subtabs 3-6, 9, 10, 12, 13.[3] We therefore

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3 The record indicates that appellants Popelka and Mueller, each of whom received a 1990 appointment and a 1991 appointment, *see* IAF, Tab 12, Subtabs 3-6, were separated after the expiration dates of their 1991 appointments, *see id.*, Subtabs 4, 5, 9, 10, 12, 13. The absence of the usual forms documenting their employment immediately before their separations apparently is the result of a delay in their separations that was caused by a preliminary injunction granted by a U.S. district court at the appellants' request; the court dissolved the injunction less than 3 months later; shortly before the separations were effected. *See, e.g.*, IAF (*Popelka*), Tab 1 (court decision). Because the appellants were separated less than a year after their 1991 appointments

find that the appellants have failed to show that they met the definition of "employee" described above. *See Fish v. Department of the Navy*, 29 M.S.P.R. 595, 598 (1986).

In their petition for review, the appellants seem to allege that statements the agency made during a court proceeding concerning their separations are inconsistent with a finding that the Board lacks jurisdiction over their appeals.[4] Even if the agency stated or suggested that the Board would have jurisdiction over these appeals, however, such a statement or suggestion would not confer jurisdiction on the Board. *See Alvarez v. Department of Veterans Affairs*, 49 M.S.P.R. 682, 686 (1991).

The appellants also seem to be renewing their argument that the agency misled them into believing that

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expired, and because there is no evidence of any other employment that could be counted toward the year of current continuous service required under 5 U.S.C. § 7511(a)(1)(A)(ii), we need not determine whether service performed after the expiration of the 1991 appointments can be considered service under other than a temporary appointment limited to 1 year or less.

4 *See supra* at 4 n.3. After dissolving its preliminary injunction, the court dismissed the appellants' petition for judicial review. *See, e.g.*, IAF (*Popelka*), Tab 1.

their appointments would become permanent and that they had been appointed under the Veterans Readjustment Act. We note, however, that the Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by statute or regulation. *See Shaw v. Department of the Navy*, 39 M.S.P.R. 586, 588 (1989). In the absence of evidence showing that the appellants met the criteria of 5 U.S.C. § 7511(a)(1)(A), we find that the Board has no jurisdiction over these appeals. *See* 5 C.F.R. § 1201.56(a)(2)(i) (an appellant has the burden of proving that the Board has jurisdiction over his appeal); *cf. Julius v. Department of the Army*, 35 M.S.P.R. 130, 133 (1987)(in the absence of an authorized appointment, an employee has no rights beyond those incident to the position to which he or she is officially appointed), *aff'd*, 852 F.2d 1293 (Fed.Cir. 1988)(Table).

Finally, because the Board has no jurisdiction over these appeals, it has no authority to review either the merits of the appellants' separations or the appellants' allegations of procedural error and prohibited personnel

practices. *See Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982); *see also Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984)(an appellant has a right to a hearing on the merits only after Board jurisdiction has been properly invoked).

ORDER

This is the final order of the Merit Systems Protection Board in these appeals. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your response to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

United States Court of Appeals for the Federal Circuit

93-3219

DONALD G. ANDERSON, WILLIAM K. POPELKA, and GARY MUELLER,

Petitioners,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: December 16, 1993

Before RICH, NEWMAN and PLAGER, *Circuit Judges*

PLAGER, *Circuit Judge*.

This is an appeal from a final decision[1] of the Merit Systems Protection Board, dismissing for lack of jurisdiction a petition for review of an agency decision to remove employees. We ***affirm*** the decision of the Board.

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1 In its decision of January 29, 1993, the full Board denied the petition for review, reopened the appeal under its own motion, and affirmed as modified the initial decision of October 1, 1992, Dkt. Nos. DE3443920451-I-1, DE3443920450-I-1, DE3443920452-I-1.

BACKGROUND

Anderson, Popelka, and Mueller were employees of the Government's General Services Administration (Government), custodians of the Federal Building in Billings, Montana. Petitioners are all combat veterans of the Vietnam War, and are eligible for appointment under the Veterans Readjustment Act (VRA). In 1990, petitioners were hired as temporary employees pursuant to 5 C.F.R. § 316.402(b).[2] The term of each appointment was one year. Anderson, Mueller, and Popelka began work on October 9, March 26, and April 30, 1990, respectively. Their appointments were renewed in 1991. Petitioners claim to have thought that their appointments were not "temporary" but were VRA appointments -- after two years of service, a VRA appointee receives a protected position within the competitive system of federal employment. 5 C.F.R. §§ 307.101(e), 315.705(a)(2).

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2 All citations to the Code of Federal Regulations are to the 1993 edition. All citations to the U.S. Code are to the 1988 edition.

By memorandum dated January 22, 1992, petitioners were notified that they would be terminated effective February 28, 1992. Upon learning of their proposed termination, petitioners sought and received a temporary restraining order in United States District Court for the District of Montana staying their removal. The Government moved to dismiss based on lack of jurisdiction. In granting the motion to dismiss and lifting the order, the district court cited the Merit Systems Protection Board (MSPB or Board) as the appropriate forum for petitioners' complaints.[3]

Petitioners were terminated June 27, 1992. Petitioners then sought review by the MSPB. The Government again moved to dismiss for lack of jurisdiction. In an initial decision dated October 1, 1992, an Administrative Judge (AJ) dismissed the petition for review, ruling that the MSPB had no jurisdiction over termination of temporary term-limited appointments. In a

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3 The decision of the district court is currently on appeal to the Ninth Circuit.

final decision dated January 9, 1993, the full Board upheld the dismissal. The Board disagreed with the AJ to the extent the AJ had held that the MSPB had no jurisdiction over appeals by temporary employees. The Board held that it had jurisdiction to review agency decisions to terminate "employees" as that term is defined by 5 U.S.C. § 7511(a)(1), which includes certain temporary employees. The Board held that on the facts of this case these petitioners were not employees over whom the MSPB had jurisdiction under the statute. Petitioners appeal to this court.

DISCUSSION

The burden of establishing that the MSPB has jurisdiction over their appeal is upon petitioners. 5 C.F.R. § 1201.56(a)(2)(i). The gravaman of petitioners' appeal to the MSPB is that they understood their appointments to be VRA appointments, and that their positions would become protected positions in the competitive service. Thus they were misled into accepting their appointments as temporary employees.

Section 7513(d) of the U.S. Code Title 5 gives the MSPB subject matter jurisdiction over agency decisions to remove an employee. An "employee" is defined as

> an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment **under other than a temporary appointment limited to 1 year or less**.

5 U.S.C. § 7511(a)(1)(A)(emphasis supplied). Petitioners were hired on a one year temporary basis pursuant to the Code of Federal Regulations:

> (b) *Noncompetitive temporary limited appointments*. An agency may give a **noncompetitive temporary limited appointment** without regard to the existence of an appropriate register to an individual in one of the categories set out below.
>
> . . . .
>
> (4) Any veteran who meets the qualifications for a veterans readjustment appointment is eligible for employment under this paragraph.

5 C.F.R. § 316.402 (emphasis supplied).

Petitioners were aware of the temporary character of their appointments. The SF-50 forms with which they were hired plainly stated that the positions they held were temporary. Petitioners also must have known that they were receiving fewer benefits, notably health care, than employees in the competitive service.

Petitioners do not deny that they were employed as temporary employees with one year appointments, but contend that the Government's misconduct in appointing them estops the Government from denying that they are protected employees within the competitive service. In essence, petitioners contend that they are employees in the competitive service by judicial construction, and therefore that the MSPB has subject matter jurisdiction over the decision to terminate them.

Petitioners argue that the MSPB is authorized to examine the Government's determination of employee status. In ***Grigsby v. United States Dep't of Commerce***, 729 F.2d 772 (Fed. Cir. 1984), the official record of

employment, the SF-50, establishing Grigsby's status was wrong due to a clerical error. This court held that the appointment paper is "not a legally operative document controlling on its face an employee's status and rights." *Id.* at 776. In that case, the Government was able to show that Grigsby did not have the employment status indicated by the form.

In this case, petitioners use *Grigsby* to argue that the employment status shown on their SF-50 forms does not preclude their equitable estoppel argument. In *Grigsby*, however, the SF-50 did not accurately reflect the Government's intention with regard to employment status. Here, it is conceded, the Government's intention is accurately reflected in the SF-50; it is the propriety of the Government's intention that is at issue, not the correctness of the record of its intention.

Petitioners present no evidence that the form was incorrect, and that they are not in fact temporary appointees. In making their estoppel argument, petitioners assert just the opposite: that although appointed

as temporary employees, their status was based on Government deception. Petitioners in effect argue that, while facially accurate, the SF-50 form is not legally controlling, leaving the MSPB, or this court, free to invent theories of jurisdiction. Even if the petitioners' argument from ***Grigsby*** were accepted, it provides no affirmative support for petitioners' basic contention that MSPB jurisdiction may be derived from Government misconduct in the initial employment decision.

Petitioners quote a plethora of cases to show that the doctrine of equitable estoppel applies to the Government. Although estoppel is often mentioned in dicta, the cases that actually estop the Government are few and far between. Petitioners' best case, ***Watkins v. United States Army***, 875 F.2d 699 (9th Cir. 1989), concerned the employment status of a homosexual soldier in the U.S. Army. The court's jurisdiction to hear Watkins's case, however, was not based on his employment status. Nor was Watkins's standing to sue at issue. In short, Watkins had an authoritative forum in

which he could argue the doctrine of estoppel. In the present case, in contrast to ***Watkins***, it is precisely these threshold requirements of jurisdiction and standing that are contested, and that petitioners seek to satisfy through estoppel arguments. Petitioners place the cart before the horse. Estoppel requires a forum; it cannot be used to build a forum.[4]

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[4] Petitioners' case is readily distinguished from cases in which an employee resigns from a protected position in the competitive service but later alleges the resignation was involuntary. Although as a general proposition resignation is presumed to be voluntary, and the MSPB has no authority to review loss of employment due to voluntary resignation, ***Schultz v. United States Navy***, 810 F.2d 1113, 1135-36 (Fed.Cir. 1987)(citation omitted), "[i]f however, the employee can demonstrate that the resignation was involuntary, then it must be treated as an adverse action, which invokes the [Civil Service Reform] Act, allowing the employee to appeal to the Board (and ordinarily entitling him to reinstatement and back pay)." ***Latham v. United States Postal Serv.***, 909 F.2d 500, 502 (Fed. Cir. 1990) (citation omitted). ***See also Scharf v. Dep't of the Air Force***, 710 F.2d 1572, 1574 (Fed. Cir. 1983); ***Burgess v. Merit Sys. Protection Bd.***, 758 F.2d 641, 643 (1985) "an involuntary resignation is a removal." Thus, an employee in the competitive service who is found to have involuntarily resigned from a protected position has a right to MSPB review under 5 U.S.C. §§ 7512(1), 7513(d) (1988). This court has held, in short, that involuntary resignation is removal, and removal does not strip an employee of the right to MSPB review of the decision to terminate. ***See Covington v. Dep't of Health & Human Servs.***, 750 F.2d 937, 944 (1984). In this case, in contrast, the Government took actions allegedly adverse to job applicants, persons who did

It is important to understand what is at issue here. The question before us is not whether the Government behaved in a way that entitles these petitioners to redress: the question is only whether, if redress is to be sought, Congress has authorized the MPSB to provide it. Petitioners seek MSPB review of an agency action that they concede is unreviewable by the MSPB on a plain reading of the statute. For this court to hold for petitioners would improperly broaden the scope of MSPB authority to include equitable review of agency appointment processes.

At the district court, petitioners were dismissed for lack of jurisdiction in view of their failure to exhaust their administrative remedies. The district court reasoned that congress provided a comprehensive scheme of administrative review of agency employment policy under the Civil Service Reform Act of 1978, and concluded that it was inappropriate for the district court to interfere.

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not, prior to the alleged adverse action, hold a protected position in the competitive service.

This court affirms the MSPB ruling that it has no jurisdiction over the claims of these petitioners.

CONCLUSION

For the foregoing reasons, the decision of the Board is affirmed.

AFFIRMED.

Supreme Court, U.S.
FILED
MAY 23 1994
OFFICE OF THE CLERK

(3)

No. 93-1468

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM POPELKA, ET AL., PETITIONERS

v.

ERIC LEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
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QUESTIONS PRESENTED*

1. Whether (in No. 93-1468) the Civil Service Reform Act of 1978, as amended, precludes an action brought by petitioners in district court to seek redress for their termination from federal employment.

2. Whether (in No. 93-1478) the Merit Systems Protection Board properly dismissed petitioners' appeal of their termination on the ground that they were hired as temporary employees.

3. Whether (in both cases) petitioners' failure to find either a judicial forum or an administrative forum for review of the merits of their claims based on termination of their federal employment violates the Due Process Clause of the Constitution.

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* Petitioners have filed two petitions for certiorari (Nos. 93-1468 and 93-1478) seeking review of decisions in two actions that arose out of the same events. This response addresses both petitions.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1468

WILLIAM POPELKA, ET AL., PETITIONERS

v.

ERIC LEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-6) and the district court (Pet. App. 7-20, 21-23) are unreported.[1]

[1] Petitioners have also filed a petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit (No. 93-1478) seeking review of a judgment in a closely related case. The appendix to the petition in this case includes the decisions in the related case, specifically, the opinion of the Federal Circuit, reported at 12 F.3d 1069 (Pet. App. 33-43), and the opinion of the Merit Systems Protection Board, reported at 56 M.S.P.R. 316 (Pet. App. 24-32). For the Court's convenience, in discussing the decisions in the related case, we shall refer to the copies of those decisions reprinted in the appendix to the petition in this case.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1994. The petition for a writ of certiorari was filed on March 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petition in this case is related to another petition filed by the same petitioners, No. 93-1478. These petitions should be considered together; they contain identical Statement, Argument, and Conclusion sections. To facilitate the Court's consideration, we address both petitions here.

1. The three petitioners were hired in 1990 by the General Services Administration (GSA) as temporary janitorial employees in the Federal Building in Billings, Montana (Pet. App. 8, 34). GSA has a national policy directing that vacancies in the custodial force be filled with temporary employees where contracting out is being considered. C.A. Supp. E.R. 5. Petitioners were appointed under the authority of 5 C.F.R. 316.402(b)(4), which permits the noncompetitive, temporary limited appointment of certain groups of individuals, including those who would meet the qualifications for appointment under the Veterans Readjustment Act (VRA), 38 U.S.C. 4214(b)(1) (Supp. IV 1992). Temporary limited appointments under 5 C.F.R. 316.402(b)(4) are not the same as permanent appointments under the VRA, which provides that veterans may obtain permanent federal employment after a probationary period of employment, see 38 U.S.C. 4214(b)(1)(D)(ii) (Supp. IV 1992), and which affords appointees the right to appeal termination during the first year of employment to the Merit

Systems Protection Board (MSPB), see 38 U.S.C. 4214(b)(1)(E) (Supp. IV 1992).

Each petitioner was initially appointed to a temporary appointment limited to one year. After the first appointment expired in 1991, each was then reappointed to a second temporary appointment limited to one year. Pet. App. 28, 34; C.A. E.R. 1-4; C.A. Supp. E.R. 1-3. In 1992, while petitioners were serving their second temporary appointments, GSA decided to terminate them (Pet. App. 35), so that it could contract out custodial labor to an organization providing employment to disabled workers (*id.* at 8). GSA has a long-standing policy favoring the contracting out of janitorial services. C.A. Supp. E.R. 5.

2. Petitioners sought relief from the proposed terminations in the United States District Court for the District of Montana. Petitioners sued GSA and Eric Lee, GSA's Regional Administrator who had ordered the termination of eleven temporary employees in three cities, including petitioners. In their complaint, as amended, petitioners alleged that their terminations without advance notice violated the Due Process Clause of the Fifth Amendment, in that the failure to provide notice prevented their union from exercising the right to contest the terminations under the union's collective bargaining agreement with GSA (C.A. E.R. 65). Petitioners also alleged that they had been appointed under the VRA, and that respondents had acted contrary to law by acting as though petitioners were temporary employees, and allegedly circumventing the preferences and protections afforded by law to VRA appointees (*id.* at 66).

Petitioners requested a declaratory judgment that they were entitled to permanent employment, *Bivens-*

type[2] damages for alleged due process violations in connection with their employment, a preliminary injunction against their terminations, and a writ of mandamus compelling GSA to bargain with the union over their terminations (Pet. App. 11). In their subsequent briefs, petitioners explained that their claim to permanent employment was based on a theory of equitable estoppel, namely, that GSA should be estopped from treating petitioners as temporary employees because it allegedly misled them into thinking they had permanent positions (*id.* at 8-11; Pet. 5-7, 12).

The district court dismissed the action for lack of subject matter jurisdiction, holding that its jurisdiction to review the merits of petitioners' estoppel and *Bivens* claims was foreclosed under the Civil Service Reform Act of 1978 (CSRA) (Pet. App. 7-20).[3] The court observed that Congress had created, through the CSRA, a "comprehensive system of administrative review" governing claims arising out of federal employment (*id.* at 19), and concluded that this "comprehensive system" precluded judicial review in cases raising government employment

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[2] *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[3] The district court had earlier issued a preliminary injunction enjoining petitioners' removal, pending review by the General Counsel of the Federal Labor Relations Authority (FLRA) of charges filed on their behalf by the union (Pet. App. 9-10). The preliminary injunction lapsed by its own terms when the General Counsel filed an unfair labor practice complaint on their behalf (*id.* at 10). On October 2, 1992, after execution of a settlement agreement by GSA and the union, the FLRA withdrew its notice of hearing and dismissed the General Counsel's complaint (C.A. Supp. E.R. 86).

issues (*id.* at 16-18). The court also observed that petitioners could seek the assistance of the Office of Special Counsel (OSC), which has jurisdiction to investigate "prohibited personnel practice[s]," 5 U.S.C. 2302(a) (1988 & Supp. IV 1992), and which can seek corrective action from the MSPB, 5 U.S.C. 1214(b) (Supp. IV 1992) (Pet. App. 15). The court made it clear, however, that its decision was based on "the intent of Congress in establishing the civil service administrative appeals system," and not the adequacy of any particular administrative remedies available to petitioners (Pet. App. 16).

3. Petitioners moved for relief from the judgment, citing as new evidence a telephone conversation that petitioners' counsel had with an unidentified individual at OSC, suggesting that OSC's administrative process was unavailable to petitioners (Pet. 7). The district court denied the motion (Pet. App. 21-23), reiterating that "[t]he jurisdiction vested in this Court is not dependent upon an analysis of the various administrative options that may or may not be available to [petitioners]" (*id.* at 22).

4. The Court of Appeals for the Ninth Circuit affirmed (Pet. App. 1-6). The court characterized petitioners' claims as "*Bivens*-type constitutional claims" and agreed with the district court that "such claims are not cognizable in federal district court in light of the [CSRA]" (*id.* at 2). The court cited a series of Ninth Circuit cases in which it had "consistently held that federal civil service employment disputes cannot be brought originally in federal district court, but must instead be resolved under the comprehensive administrative scheme created by the CSRA" (*id.* at 3). The court noted that this principle

applies "whether or not the CSRA provides the remedy sought by the federal employee" (*id.* at 4). The court concluded that, although the rights of temporary employees were limited under the CSRA, they were nevertheless covered by that Act and subject to the rule of preclusion (*id.* at 4-5).

5. After the preliminary injunction expired, and while petitioners were pursuing the lawsuit described above, GSA terminated them from employment, and petitioners appealed their terminations to the MSPB. In the initial decision by an administrative judge, the appeals were dismissed for lack of jurisdiction (Pet. App. 24). Petitioners then petitioned for review before the full MSPB.

The MSPB affirmed (Pet. App. 24-32). The MSPB noted that it had jurisdiction over appeals from the removal of an "employee," as that term is defined in 5 U.S.C. 7511(a) (Supp. IV 1992) (Pet. App. 27). The MSPB found that petitioners had failed to show that they met the relevant part of this definition (*id.* at 28-29), because none of them had a year of continuous service under other than a temporary appointment limited to one year or less (*id.* at 28). The MSPB rejected petitioners' argument that it had jurisdiction under an estoppel theory, reasoning that "the [MSPB's] jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by statute or regulation" (*id.* at 30), and that, in the absence of evidence that petitioners actually met the definition of "employee" in Section 7511(a), it had no jurisdiction over their appeals (Pet. App. 30).

6. Petitioners appealed the MSPB's decision to the Court of Appeals for the Federal Circuit, which

affirmed (Pet. App. 33-43). The court noted that petitioners did not deny that their appointments were temporary, but that petitioners argued that their appointment forms should be disregarded because they had been misled as to the nature of the appointments (*id.* at 36, 39-40). The court characterized petitioners' jurisdictional position as arguing "that MSPB jurisdiction may be derived from Government misconduct in the initial employment decision" (*id.* at 40). The court declined to adopt this theory, stating that "[e]stoppel requires a forum; it cannot be used to build a forum" (*id.* at 41). The court concluded that allowing MSPB review on such a basis would "improperly broaden the scope of MSPB authority to include equitable review of agency appointment processes" (*id.* at 42).

DISCUSSION

The Federal Circuit's decision that the Merit Systems Protection Board (MSPB) lacked jurisdiction over petitioners' appeal from their removal because petitioners were serving under temporary appointments is correct and does not conflict with any decision of this Court or any other court of appeals. The Ninth Circuit's decision holding that the Civil Service Reform Act (CSRA) precludes district court jurisdiction over petitioners' claims arising out of federal employment also is correct and does not conflict with any other decisions.

Petitioners' attempt to create a conflict between the two court of appeals' decisions is unavailing. Even though petitioners have been unable to find a judicial or administrative forum for their claims now that the Federal Circuit has affirmed the dismissal of their

claims by the MSPB, the Federal Circuit's holding on the scope of the MSPB's jurisdiction has no effect on the question of federal court jurisdiction considered by the Ninth Circuit, because, as the Ninth Circuit recognized, the CSRA precludes judicial review even where it provides no administrative remedy. Finally, since temporary employees have no constitutionally protected property right to their positions, there is no requirement, as petitioners suggest, that jurisdiction over their claims be found in at least one of the two forums.

1. *The Federal Circuit's Decision*

In pertinent part, the CSRA provides that the MSPB has jurisdiction to review removals of only those employees who "ha[ve] completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less." 5 U.S.C. 7511(a)(1)(A)(ii) (Supp. IV 1992). Petitioners do not contest that they were employees serving under temporary appointments limited to one year or less, with appointment (SF-50) forms indicating the temporary nature of their appointments. Petitioners therefore clearly do not meet the statutory requirements for MSPB review of their removals.

Petitioners claim that the MSPB should not have relied exclusively on the "temporary" designation on their SF-50 forms, but should have allowed them to present extrinsic evidence of their employment status in support of their equitable estoppel theory. The statutory provisions governing the MSPB's jurisdiction are clear, however, that jurisdiction is limited to those cases meeting the *legal* require-

ments.[4] *Perez* v. *MSPB*, 931 F.2d 853, 855 (Fed. Cir. 1991) ("The MSPB has jurisdiction over appeals only from the types of agency actions specifically enumerated by law, rule, or regulation."). Petitioners cite no authority for the proposition that the MSPB's jurisdiction could be expanded under a theory of equitable estoppel, and we are not aware of any.

The sole case petitioners cite to support their position that their SF-50 forms should be disregarded, *Grigsby* v. *United States Department of Commerce*, 729 F.2d 772 (Fed. Cir. 1984), is inapposite. In *Grigsby*, both parties agreed that there were errors "in the technical completion of the appointment documents" (SF-50 and SF-52 forms), *id.* at 774, 776, so that the forms did not accurately reflect the government's intention to appoint the appellant in that case as a probationary employee. The Federal Circuit held only that, in light of the parties' agreement that the appointment forms were erroneous, "the Government is not barred from demonstrating ministerial error in the execution of the [forms]." *Id.* at 775-776. Here, it has not been asserted that petitioners' designation as temporary employees on

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[4] It is well established that the terms and conditions of federal employment are ordinarily governed by the nature of the formal appointment that an employee receives, and not by contractual or quasi-contractual understandings. See *Chu* v. *United States*, 773 F.2d 1226, 1229 (Fed. Cir. 1985) ("federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government"); *Julius* v. *Department of Army*, 35 M.S.P.R. 130, 133 (1987) (an employee has no rights beyond those incident to the position to which he or she is officially appointed), aff'd, 852 F.2d 1293 (Fed. Cir. 1988) (Table).

their SF-50 forms resulted from such a "ministerial error" or that the forms did not accurately reflect the General Service Administration's intention. Petitioners cite no other authority for the proposition that the MSPB can ignore a valid SF-50 form when examining its own jurisdiction.[5]

2. *The Ninth Circuit's Decision*

a. The Ninth Circuit correctly concluded that the CSRA precludes judicial review of petitioners' equitable estoppel claims. As this Court has recognized, the CSRA is a comprehensive statutory scheme enacted to replace an "outdated patchwork" of statutes and rules governing review of federal personnel actions with "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 444-445 (1988). "The goal [of the CSRA] was 'a single unified personnel policy which [takes] into account the requirements of all the various laws and goals governing Federal personnel management.' " *Saul* v. *United States*, 928 F.2d 829, 833 (9th Cir. 1991) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 53 (1978)).

In light of these purposes, this Court has held that Congress intended the remedial scheme of the CSRA to preclude other avenues of relief for actions arising out of federal employment. In *Fausto*, the Court held

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[5] Moreover, the MSPB's jurisdiction was not at issue in *Grigsby*, where the district court had jurisdiction under a special provision of the CSRA, 5 U.S.C. 7121(f). 729 F.2d at 774 n.4.

that the CSRA's administrative and judicial review provisions precluded a federal employee from seeking judicial review of an adverse personnel action in the former United States Claims Court under the Back Pay Act, 5 U.S.C. 5596(b)(1), even though the CSRA provided no administrative remedy for the personnel action at issue. 484 U.S. at 454-455.

The courts of appeals have likewise consistently held, both before and after *Fausto*, that the CSRA's remedial scheme precludes all other avenues of relief for claims brought by federal employees arising out of the federal employment relationship. See, *e.g.*, *Saul*, 928 F.2d at 843 (no district court jurisdiction over state common law tort claims against a federal employee's supervisor); *Ryon* v. *O'Neill*, 894 F.2d 199, 204 (6th Cir. 1990) (challenge to reassignment decision); *Harrison* v. *Bowen*, 815 F.2d 1505, 1516 (D.C. Cir. 1987) (excepted-service employee's claim of wrongful termination). Although no previous case has addressed claims exactly like those presented here, the courts of appeals have held that federal employees may not obtain review by the district courts of similar claims, such as claims of a scheme to prevent an employee from being promoted, see *Schrachta* v. *Curtis*, 752 F.2d 1257, 1260 (7th Cir. 1985) (holding that CSRA did not create an implied right of action in the district courts), and challenges to performance ratings and to the federal rating system in general, see *Veit* v. *Heckler*, 746 F.2d 508, 511 (9th Cir. 1984) (finding "a clear congressional intent to permit federal court review as provided in the CSRA or not at all"). See also *Stephens* v. *HHS*, 901 F.2d 1571, 1575-1576 (11th Cir.) (challenge to denial of promotion), cert. denied, 498 U.S. 998 (1990). In light

of this uniformity of circuit authority, "[t]here is no longer any serious dispute that the CSRA preempts challenges to personnel actions brought under federal law." *Berrios* v. *Department of Army*, 884 F.2d 28, 30 (1st Cir. 1989).

b. For the same reasons, the CSRA precludes petitioners' *Bivens* claims for alleged violations of constitutional rights in connection with their federal employment. See *Bush* v. *Lucas*, 462 U.S. 367, 368 (1983). In *Bush*, this Court found that the "elaborate remedial system that has been constructed [in the CSRA] step by step, with careful attention to conflicting policy considerations," *id.* at 388, constitutes a "special factor" counseling against creation of a new remedy, and concluded that a *Bivens* claim by an employee based on actions taken by his supervisor is precluded. Subsequently, in *Schweiker* v. *Chilicky*, 487 U.S. 412, 427-428 (1988), the Court extended the holding of *Bush* to foreclose *Bivens* suits even where the statutory remedy for the alleged constitutional violation is incomplete. See also *Bush*, 462 U.S. at 388.

The lower courts have uniformly followed *Bush* and *Chilicky* in holding that *Bivens* actions arising out of federal employment are precluded. *Saul*, 928 F.2d at 840 (no *Bivens* remedy for allegedly unconstitutional opening of mail received at office); *Berrios*, 884 F.2d at 31 (no *Bivens* remedy for alleged due process violation in termination without notice); *Hill* v. *Department of Air Force*, 884 F.2d 1318, 1321 (10th Cir. 1989) (no *Bivens* action for alleged due process violations that constitute prohibited personnel practices), cert. denied, 495 U.S. 947 (1990); *Karamanos* v. *Egger*, 882

F.2d 447, 452 (9th Cir. 1989) (no *Bivens* remedy for alleged First Amendment violations).

c. In light of the overwhelming precedent cited above, it is clear that the courts below correctly held that petitioners' claims, indisputably relating to their federal employment, had to be dismissed. Petitioners have not cited, nor are we aware of, any court of appeals decision recognizing a cause of action for claims similar to theirs arising out of the federal employment relationship. For these reasons, no further review of the Ninth Circuit's decision is warranted.[6]

3. *The Effect of the Federal Circuit's Decision on the Ninth Circuit's Jurisdictional Ruling*

a. The ultimate gravamen of the petitions is that petitioners' claims should have been heard by either the MSPB or the district court, and that they cannot be foreclosed from both forums. Specifically, petitioners contend that the Ninth Circuit should not have upheld the dismissal of their district court case after it was informed that the Federal Circuit had affirmed the MSPB's finding of lack of jurisdiction.

As the Ninth Circuit implicitly recognized (see Pet. App. 5 n.1), however, the dismissal of petitioners' claims by the MSPB does not create district court jurisdiction over those claims. The CSRA preempts alternative routes of judicial review of claims based on federal employment actions, even when the CSRA itself provides no administrative remedy for the

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[6] In any event, petitioners' *Bivens* action against GSA could not proceed in light of this Court's decision in *FDIC* v. *Meyer*, 114 S. Ct. 996, 1004-1006 (1994), holding that *Bivens* actions may not be implied against federal agencies.

particular claim. Thus, as discussed above, this Court held in *Fausto* that the CSRA foreclosed an employee's resort to the United States Claims Court under the Back Pay Act, even though the employee had no CSRA remedy by which to challenge his suspension. 484 U.S. at 455. The Court concluded that, because the CSRA carefully addressed the rights of Fausto's category of federal employees elsewhere, that category's exclusion from the CSRA remedy at issue (MSPB review) was deliberate and represented a "clear congressional intent" to preclude access, not just to remedies under the CSRA, but also to the judicial remedies that had been available before the enactment of the CSRA. *Id.* at 448-449. The Court stated:

> It seems to us evident that the absence of provision for [non-preference-eligible excepted-service employees] to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type governed by Chapter 75.

Ibid.

This Court also observed in *Fausto* that to recognize a remedy allowing non-preference-eligible excepted-service employees to bring suit in federal court would turn the structure of the CSRA "upside down," 484 U.S. at 449, by giving them a right, *i.e.*, judicial review, that was not available to better protected employees. The same is true here; petitioners are asking for a right that is not available to

permanent employees with greater protections under the CSRA, *i.e.*, the right to bring a *Bivens* action in district court. Such a conclusion would be inconsistent with Congress's determination that permanent federal employees should have more extensive procedural protections than temporary employees, and it would undo Congress's balancing, in the CSRA, of the rights of various classes of federal employees.

The lower courts have uniformly concluded that the lack of a remedy or a complete remedy under the CSRA does not confer district court jurisdiction under *Bivens* or any other theory of implied rights of action. The courts have declined to create new remedies "to prevent them from conflicting with the remedial system that Congress prescribed." *Saul*, 923 F.2d at 843. The CSRA is "so precise and delicately balanced that the engrafting of ancillary remedies upon the framework of the Act would inevitably create chaos within the federal sector, and sow the seeds of impermissible conflict." *Id.* at 842 n.25 (quoting *Tucker* v. *Defense Mapping Agency*, 607 F. Supp. 1232, 1239 (D.R.I. 1985)); see also *Rivera* v. *United States*, 924 F.2d 948, 951 (9th Cir. 1991); *Ryon*, 894 F.2d at 204 ("To hold * * * that personnel actions are reviewable in federal courts under general jurisdictional statutes enacted before the CSRA would mean a return to the chaotic conditions which the CSRA was specifically crafted to remedy.").

b. The fact that petitioners have no judicial forum for their claims does not violate their constitutional rights. Although this Court has cautioned that " 'serious constitutional question[s]' * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim,"

Webster v. *Doe*, 486 U.S. 592, 603 (1988), this case does not implicate that concern. As temporary employees with no legitimate expectation of continued employment, petitioners had no property interest at stake, and they therefore had no constitutional right to due process before they were removed from their positions. See *Board of Regents* v. *Roth*, 408 U.S. 564, 578 (1972) (no property interest where no claim of entitlement to continued employment).

While not denying that they were serving under temporary appointments, petitioners contend that they had an entitlement to continued employment under *Perry* v. *Sindermann*, 408 U.S. 593 (1972), due to a "mutually explicit" understanding (Pet. 13-14). However, as explained above, see note 4, *supra*, the expectations of employment under the CSRA are governed exclusively by the terms of the appointment itself, and quasi-contractual understandings outside those terms do not create constitutionally protected property rights. To hold otherwise would contravene the principle that the CSRA provides the exclusive remedies for all employees covered by its terms. The principal case relied on by petitioners, *Orloff* v. *Cleland*, 708 F.2d 372, 377 (9th Cir. 1983), is inapposite, as it involved a government employee not covered by the CSRA; in that situation, extrinsic evidence may have been relevant to determine whether the employee had a property interest, created by contract, in his continued employment.[7]

c. In any event, petitioners were not completely without administrative remedies. If petitioners be-

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[7] *Roth* v. *Veteran's Administration*, 856 F.2d 1401, 1409 (9th Cir. 1988), cited by petitioners (Pet. 14), also involved a non-CSRA employee.

lieved that they were terminated in violation of merit system principles, they could have submitted their allegations to the Office of Special Counsel, which has the authority to investigate prohibited personnel practices, to seek corrective action from federal agencies, and to institute proceedings before the MSPB, see 5 U.S.C. 1212(a), 1214, 1215, and 2302(a) and (b) (1988 & Supp. IV 1992), even when the employee may not personally appeal directly to the MSPB. See *Harrison*, 815 F.2d at 1511-1512. Temporary employees are entitled to pursue this remedy.[8] See 5 U.S.C. 2302(a)(2)(B).

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[8] Petitioners err in suggesting (Pet. 11 n.4) that temporary employees are barred from this avenue. They overlook the distinction between the two types of MSPB jurisdiction, appellate and original. Appellate MSPB jurisdiction involves appeals by employees from final personnel actions, from which avenue temporary employees are barred. See, *e.g.*, *Hunter* v. *Department of Army*, 40 M.S.P.R. 449, 451 (1989); *Cinnamon* v. *FAA*, 10 M.S.P.R. 598 (1982). Original MSPB jurisdiction involves actions initiated in the MSPB by the Special Counsel on an employee's behalf on the grounds of prohibited personnel practices. Temporary employees are not barred from seeking relief by this route, nor is the OSC barred from bringing the temporary employee's complaints to the MSPB. See, *e.g.*, *Special Counsel* v. *GSA*, 45 M.S.P.R. 411 (1990) (granting Special Counsel's request to stay the expiration of a temporary employee's appointment); *Wren* v. *Department of Army*, 2 M.S.P.R. 1, 2 (1980) (explaining distinction between the two types of proceedings, and, after holding that appellant could not herself appeal her termination to the MSPB, referring her allegations to the Special Counsel).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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